

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT BRIEF FOR PETITIONERS.
PHILADELPHIA ELECTRIC COMPANY.
THE UNITED GAS IMPROVEMENT COMPANY

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,635

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PHILADELPHIA ELECTRIC COMPANY, and
THE UNITED GAS IMPROVEMENT COMPANY, *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*

On Petition to Review Order of the
Federal Power Commission

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*United States Court of Appeals
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District of Columbia Circuit*

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QUESTION PRESENTED

Independent natural gas producers filed increases in rates over pre-existing filed rates which have never been found lawful by the Federal Power Commission, and the Commission instituted proceedings under Section 4(e) of the Natural Gas Act to determine the lawfulness of the increased rates. The purported basis for the increased rate under the gas sales contracts between the producers and their pipeline purchasers was an increase in State gathering or severance taxes:

The question presented is whether the Commission may exclude distributor representatives of consumer interests (which are direct and indirect customers of the pipelines) from participation in such proceedings solely because an increase in State taxes was the event which provided contractual authorization for the filing of such increased rates?

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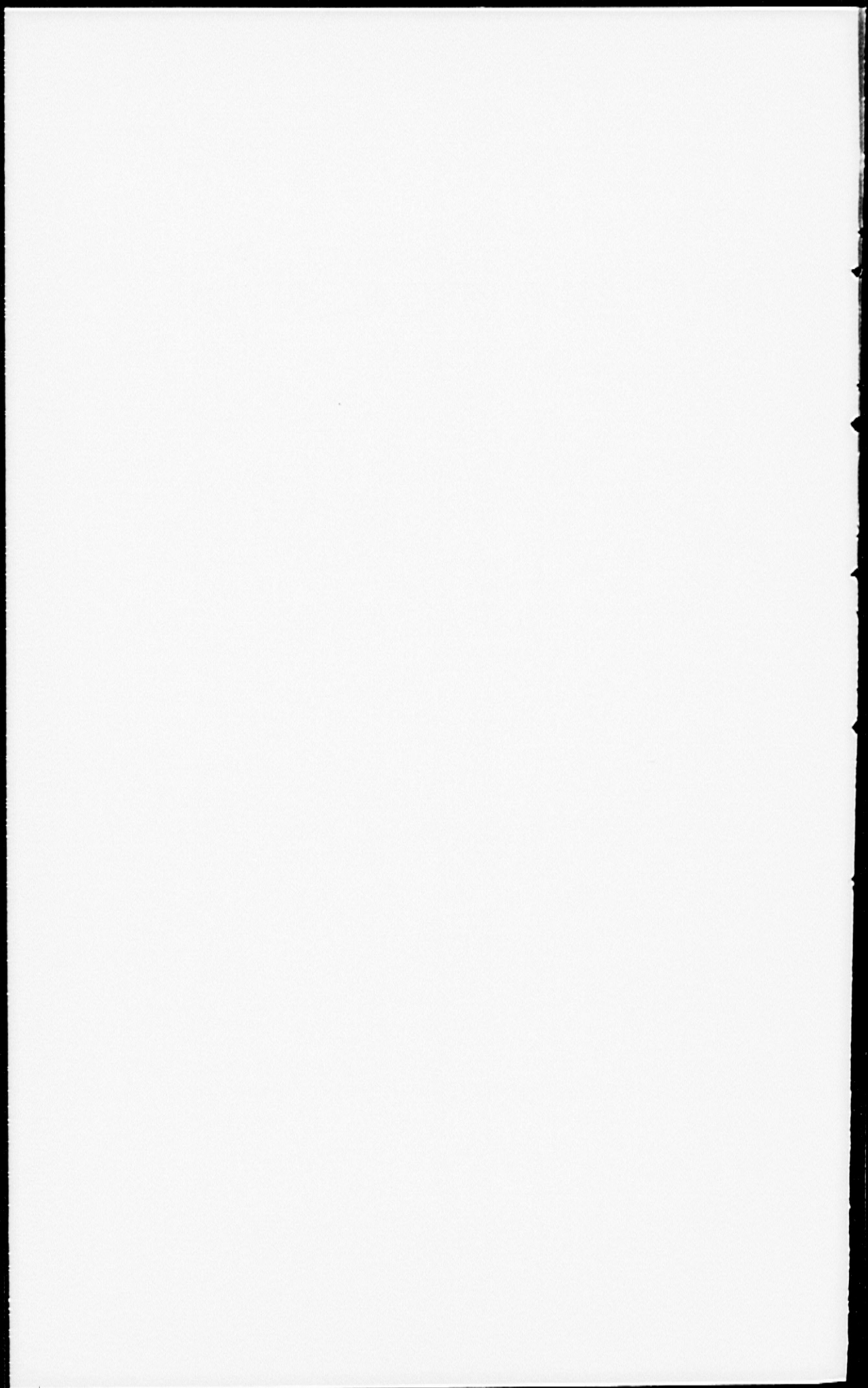
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v.

FEDERAL POWER COMMISSION, *Respondent*

On Petition to Review Order of The
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**JOINT BRIEF FOR PETITIONERS,
PHILADELPHIA ELECTRIC COMPANY,
THE UNITED GAS IMPROVEMENT COMPANY**

JURISDICTIONAL STATEMENT

This is a proceeding to review an order of the Federal Power Commission which excluded Petitioners from participation in thirteen proceedings initiated by the Commission under Section 4(e) of the Natural Gas Act to determine the lawfulness of increased rates filed by certain producers of natural gas.

This Court has jurisdiction to review such order under the provisions of Section 19(b) of the Natural Gas Act, 52

Stat. 831 (1938), as amended, 15 U.S.C. §717r(b) (1958). The order under review finally excluding petitioners from participation in the hearings was issued by the Respondent Commission on December 3, 1959 (R. 3291-95). Philadelphia Electric Company, one of the Petitioners herein, filed a petition for rehearing on January 4, 1960 (R. 3308-14). The United Gas Improvement Company, the other Petitioner herein, filed its petition for rehearing on December 31, 1959 (R. 3296-306). Orders denying rehearing were issued on January 29, 1960 (R. 3322-23). The joint and several petition for review was filed in this Court on March 25, 1960.

STATEMENT OF THE CASE

Petitioners are engaged in the distribution of natural gas to consumers in the Philadelphia, Pennsylvania area. Petitioner Philadelphia Electric Company (Philadelphia Electric) distributes gas to some 200,000 customers in the Philadelphia suburban area. Petitioner The United Gas Improvement Company (UGI), under an agreement with the City of Philadelphia, operates the municipally-owned gas works of that City which currently serves upwards of 600,000 customers located within the city limits.

Petitioners receive almost their entire natural gas requirements from Texas Eastern Transmission Corporation (Texas Eastern) and Transcontinental Gas Pipe Line Corporation (Transco). Texas Eastern, in turn, purchases substantial quantities of the natural gas which it transports and resells to its distribution customers, including Petitioners, from the United Gas Pipe Line Corporation (United). All three of these pipeline corporations are interstate natural gas companies subject to the jurisdiction of the Federal Power Commission under the terms of the Natural Gas Act. Much of the natural gas which these pipeline corporations transport and resell, including all of the gas involved in the instant cases, is purchased under

long-term contracts (see, e.g., R. 781-818) from producers located within the State of Louisiana.

The State of Louisiana has for many years imposed both severance and gathering taxes on the production of natural gas. Before August 1, 1958, the gathering tax was imposed at the rate of one cent per 1,000 cubic feet (abbreviated Mcf) of natural gas gathered.¹ The severance tax was imposed at the rate of three mills per Mcf produced.² The total state tax was therefore 1.3 cents per Mcf.

Contracts executed prior to August 1, 1958, between Louisiana gas producers and their pipeline purchasers typically provided that the buyer, in addition to paying the stipulated price for the gas, should reimburse the seller for the existing gas gathering tax and for all or some fraction of any new or additional taxes imposed by the State or its subdivisions upon the buyer on account of the production, delivery or sale of the gas subject to the contract (see, e.g., R. 804-05).

Effective August 1, 1958, Louisiana increased the gathering tax to two cents per Mcf, raising the total tax on gas to 2.3 cents per Mcf.³ Accordingly, all producers whose gas sale contracts contained the typical language outlined above became *contractually* entitled to receive increased tax reimbursements from their pipeline purchasers.

However, since sales in interstate commerce of natural gas are subject to the jurisdiction of the Federal Power Commission and the provisions of the Natural Gas Act,⁴ rates charged by a producer for sales of natural gas may be changed only by filing an appropriate supplement to a rate schedule theretofore filed in conformity with

¹ La. Rev. Stat. 47:671 (1950).

² La. Rev. Stat. 47:633 (1950).

³ Act No. 8, Laws 1958, Regular Sess. See also La. Rev. Stat. 47:678 (1959 Supp.).

⁴ *Phillips Petroleum Corp. v. State of Wisconsin et al.*, 347 U. S. 672 (1954).

the Commission's rules and regulations under Section 4 of the Natural Gas Act.

Accordingly, each of the eleven producers whose rate schedules are involved in this review proceeding filed with the Commission a notice of change, i.e., a rate schedule supplement, reciting the imposition of the additional gathering tax and the reimbursement provisions of the appropriate contract and claiming the resulting increased rate (See, e.g., R. 832-34).

The Commission, however, aware that the validity of the gathering tax was the subject of litigation, suspended the effectiveness of said rate schedule supplements for one day and then allowed each of them to become effective subject to refund.⁵ (See, e.g., R. 2986-88).

The Louisiana Legislature, also taking note of the doubtful validity of the gas gathering taxes (then totalling 2.0 cents per Mcf) temporarily suspended these taxes effective December 1, 1958,⁶ and simultaneously substituted therefor a 2.0 cents per Mcf increase in the gas severance

⁵ The proceedings which were thus initiated by the Commission and which are brought here by the petition for review are:

PRODUCER:	DOCKET
Amerada Petroleum Corporation	G-15561
Hassie Hunt Trust, et al.	G-15581
Jefferson Lake Sulphur Co., (Op.), et al.	G-15850
Superior Oil Company	G-15554
Sunray Mid-Continent Oil Co.	G-15593
Sunray Mid-Continent Oil Co. (Op.), et al.	G-15594
Southwest Gas Producing Co.	G-15663
Sohio Petroleum Co.	G-16060
Sinclair Oil & Gas Co.	G-15662
Willard E. Walker	G-15685
Pure Oil Company	G-15582

These proceedings will sometimes be referred to as the "gathering tax dockets."

⁶ Act No. 3, Laws 1958 First Special Session. (Sometimes referred to as "House Bill No. 2.") See also La. Rev. Stat. 47:681.1 (1959 Supp.)

tax (from 0.3 cents to 2.3 cents per Mcf, thus maintaining the total state tax on gas at its former rate).⁷

In most cases, the producers also claimed the right for reimbursement on some part or all of the substituted severance tax. The Commission allowed most of these increases to become effective without suspension. However, Willard E. Walker and Pure Oil Company filed notices of changes which claimed a contractual right to be reimbursed for 1.75 cents per Mcf of the 2.0 cents per Mcf additional severance tax, or 82.5% of the additional tax (see, e.g., R. 835-36), whereas the contract provisions upon which the filings were allegedly based provided for reimbursement of only 75% of "new or additional" taxes.⁸ (R. 804-05). Accordingly, the Commission, questioning the producers' interpretation of the contract terms, found that the "changed rate has not been shown to be justified, and may be unjust, unreasonably discriminatory or otherwise unlawful," (R. 3069, 3079) and suspended the increase for one day and then allowed it to become effective under bond.⁹

⁷ Act No. 2, Laws 1958 First Special Session. (Sometimes referred to as "House Bill No. 1.") See also La. Rev. Stat. 47:633 (1959 Supp.) In the case of certain low pressure gas the severance tax was increased only from 0.3 cent to 1.3 cents per Mcf, thereby reducing the total tax on such gas by 1.0 cent per Mcf. *Ibid.* The gas severance tax originally was to revert to three mills per Mcf on August 1, 1960. However, the existing rates were extended until 7:00 A.M. on June 30, 1964 by Acts 1960, Regular Sess., No. 9.

The gas gathering tax was ultimately found unconstitutional, *Bel Oil Corp. v. Fontenote*, 238 La. 1002, 117 So. 2d 571 (1959), but with regard to refunds, the Commission has not yet held hearings to decide who are "the persons entitled thereto." (R. 2987)

⁸ Under *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), the seller may not file an increase which is greater than that authorized by the contract.

⁹ The proceedings which were thus initiated by the Commission and which are brought here by the petition for review are:

Willard E. Walker
Pure Oil Company

Docket G-17662
Docket G-17729

These proceedings will sometimes be referred to as the "severance tax dockets."

Thus, as a result of Commission action thirteen proceedings were initiated, eleven gathering tax dockets and two severance tax dockets. Petitioners filed petitions to intervene in each of these thirteen proceedings on the grounds that each proceeding involved sales to Transco, one of their principal pipeline suppliers,¹⁰ that the allowance of increased rates would ultimately result in increased rates charged them by such supplier¹¹ and that their interests were not adequately represented by any existing party.¹² (See, e.g., R. 3190-92, R. 3102-05). With minor exceptions no other parties sought intervention in these proceedings.¹³

The Commission, by its order of December 3, 1959 (the order under review) denied petitioners leave to intervene in the subject gathering and severance tax dockets. In timely petitions for rehearing¹⁴ petitioners pointed out

¹⁰ Actually, as the petitions for rehearing (R. 3296, 3307) pointed out, the subject dockets involve sales to Texas Eastern and United, as well as Transco.

¹¹ Under the Commission's "rolled-in rate policy," which it has consistently followed in determining pipeline rates, Philadelphia Electric and UGI would have to pay their proportionate share of any increased costs of purchased gas reflected in the rates of their pipeline suppliers.

¹² On May 20, 1959, Philadelphia Electric filed its petition to intervene in Docket No. G-16,060; on June 2, 1959, in Docket Nos. G-15,593, G-15,594, G-17,541, and G-15,582; on June 19, 1959, in Docket Nos. G-15,561, G-17,662 and G-15,685, and on July 6, 1959, in Docket Nos. G-15,554, G-15,663 and G-15,662. On April 29, 1959, UGI filed petitions to intervene in Docket Nos. G-15,581 and G-15,850 and in all the foregoing dockets except Docket No. G-15,561. Intervention was also sought by Petitioners in many other similar dockets but Commission action in such dockets was taken in orders distinct from the one here under review.

¹³ Public Service Electric & Gas Company and South Jersey Gas Company petitioned for permission to intervene in Docket Nos. G-15,561 and G-16,060. These petitions were denied as to Docket No. G-16,060 by order of September 30, 1959 (R. 3289-90). No action has been had on the petitions in Docket Nos. G-15,561. United Fuel Gas Company, a pipeline, was permitted to intervene in Docket No. G-15,850 by order of December 17, 1958 (R. 3062).

¹⁴ UGI's petition also sought rehearing of corresponding Commission action taken December 15, 1959 with regard to similar gathering tax proceedings in Docket Nos. G-15,625 and G-15,857 (R. 3296).

that annual amounts of \$380,840¹⁵ were involved in the subject thirteen proceedings alone, that the Commission had suspended at least 750 tax-inspired producer rate increases, involving annual amounts totaling \$10,854,709 (R. 3299, 3310), that such amounts were only a fraction of the total financial impact upon consumers of Louisiana gas taxation, and asserted that the Commission should consider (1) whether or not the rates in effect before the addition of the tax-inspired rate increases were just and reasonable (for if not, the producers should be required to absorb all or a part of the increases), (2) whether or not the several producers or any of them had a valid federally-cognizable contractual right to file for the reimbursement of the increased taxes, and, (3) whether the commission should, regardless of the reasonableness of the pre-existing rates in effect, in the exercise of its discretion, require all or a substantial portion of the Louisiana gathering and severance taxes be absorbed by the equity ownership of the several producers, rather than passed on to the ultimate interstate gas consumer. (R. 3299-300, 3311)

Brief orders denying rehearing without explanation of the basis for such denial, were issued on January 29, 1960 (R. 3322-23). The petition for review was filed in this Court on March 25, 1960.

STATUTES AND REGULATIONS INVOLVED

The relevant portions of the Natural Gas Act, the Commission rules and regulations thereunder, and of the Louisiana Revised Statutes, are set out at length in Addendum 1, *infra*.

¹⁵ See, e.g. R. 3305. The increases shown on Appendix I of UGI's petition for rehearing total \$381,234. However, \$394 represents an increase filed in Docket No. G-15,857, see note 14, *supra*, and not brought here for review. Philadelphia Electric's petition for rehearing also set out \$52,889 of increases to Texas Transmission which, however, do not necessarily affect the costs of petitioners' suppliers.

STATEMENT OF POINTS

1. The Commission erred, as a matter of law, in concluding that Petitioners, who must ultimately pay their pro-rata share of the rate increases involved in the subject gathering and severance tax dockets, do not have a present, legal right to participate in the proceedings in such dockets.

2. To the extent, if any, its discretion is here involved, the Commission abused its discretion by denying the Petitioners leave to intervene in the subject gathering and severance tax dockets.

SUMMARY OF ARGUMENT

Petitioners are entitled, under the decisions of this Court, to intervene as of right in the instant Section 4(e) producer rate increase proceedings before the Federal Power Commission because they have shown that they could be "aggrieved" by the Commission's substantive decisions herein.

Petitioners, as ultimate customers of the purchasing pipelines, have a direct and immediate financial interest in the outcome of these proceedings. The independent-producer parties are collecting the rate increases involved herein from the pipelines and the pipelines have passed these increases along to Petitioners and others similarly situated.

If admitted to these proceedings, Petitioners would challenge the lawfulness of the increased rates, and raise substantial issues regarding the proper treatment of State tax reimbursements and other matters which, if resolved in favor of Petitioners, would result in lower rates for the future and in refunds of past overcharges collected subject to refund. Such refunds would flow to Petitioners via the pipelines.

Since they stand directly to gain or lose from the outcome of these proceedings, Petitioners would clearly be "aggrieved" by Commission denial of their contentions and ap-

proval of the increased rates. The Commission, having ordered a hearing on the lawfulness of the increased rates, could not exclude petitioners or refuse to consider Petitioners' contentions.

Accordingly, Petitioners are entitled to intervene as of right in the instant proceedings.

ARGUMENT

I

PETITIONERS HAVE A DIRECT ECONOMIC INTEREST IN THE SUBJECT PROCEEDINGS BECAUSE THE COMMISSION MUST DETERMINE THE LAWFULNESS OF UNTESTED RATES COLLECTED FROM PETITIONERS' SUPPLIERS SUBJECT TO REFUND.

- A. These proceedings involve rate increases which Petitioners are already paying and which, in accordance with Commission's practice, can only be challenged in such proceedings.**

Each of the subject proceedings involves an increase in rate filed by an independent producer of natural gas for sales to Transco, Texas Eastern or United, Petitioners' direct and secondary pipeline suppliers. As indicated earlier, the gathering-tax-inspired increases became effective in August 1958 and the severance-tax-inspired increases in January 1959 (See, e.g., R. 2987, 3069). Petitioners are currently paying these increases because Transco, Texas Eastern and United passed them on by filing new and increased pipeline rates which were based in part upon these higher payments to producers.¹⁶

Although the resulting pipeline increases subsequently became effective subject to refund, petitioners will not be able to obtain any relief against the tax-inspired increases here involved merely because of the possible refundability of the pipeline rates—nor may they protect themselves

¹⁶ The Commission has given the several pipeline rate increases the following designations: Transcontinental Gas Pipe Line Corporation, Docket No. G-18,783; Texas Eastern Transmission Corporation, Docket No. G-18,841; and United Gas Pipe Line Company, Docket No. RP60-2.

against such producer increases in the pipeline rate proceedings—because the Commission has taken the position that the justness and reasonableness of producer rates may not be challenged in pipeline rate cases. At the very outset of producer regulation the Commission stated:

“The producer-supplier rates, the reasonableness of which interveners seek to probe here, are rates and charges which have become effective pursuant to filed rate schedules. The rates set forth in the effective rate schedules are legal rates. They represent the only rates which the producer-suppliers to . . . [the pipeline] may charge and which [the pipeline] . . . may pay. . . .

Clearly, interveners here cannot inquire into the justness and reasonableness of the producer-supplier rates in this proceeding. If such inquiry is desired, interveners’ remedy lies elsewhere in the Natural Gas Act and not by a collateral attack here. . . .¹⁷

The “elsewhere in the Natural Gas Act,” just quoted, necessarily refers to a direct attack by Petitioners upon producer rates in the producer rate proceedings such as those involved herein.

B. Petitioners are directly interested in these proceedings because acceptance of Petitioners’ substantive contentions by the Commission would result in refunds to Petitioners as well as reductions in their future gas purchase costs.

The reasons which impelled the Commission to deny intervention of Petitioners are not readily apparent from the order under review. As to the gathering tax dockets the Commission stated that (R. 3292):

“The increased rates filed and suspended as the result of Louisiana taxes is considered a separate type of

¹⁷ *Tennessee Gas Transmission Company*, Docket No. G-5259, 14 FPC 860, 861 (1955). The increases by any producer to a pipeline are passed on in one form or another to all of the pipeline’s customers. This is termed a “rolled-in rate” policy, i.e., increased costs such as producer rate increases are rolled into the pipeline’s overall rate structure.

issue or determination from the normal periodic or favored-nations type of increase, since as a result of the orders issued, the validity or invalidity of such increased rates depends primarily on judicial decision...."

As to the severance tax dockets the Commission stated only that "no public interest would be served by allowing intervention...." (R. 3293). However, from Commission pronouncements in other connections it has become clear that the Commission regards the reimbursement by the pipelines of local taxes imposed upon independent producers as obviously proper and, in fact, self-justifying.¹⁸ Accordingly, the Commission practice has been to permit such reimbursement to go unchallenged under Section 4(e) of the Act unless one or the other of what it apparently regards as the only necessary elements, viz, a valid tax or a contractual right to reimbursement, is missing.¹⁹

Petitioners' petitions for rehearing advanced a number of arguments challenging the Commission's practice.

First, Petitioners argued (R. 3311) that since the Commission's pipeline rate policies, discussed above, have the effect of automatically passing on to the customers of interstate pipelines any increase in reimbursements of local

¹⁸ The Commission recently stated to the Ninth Circuit:

"Since state taxes upon the gathering of gas or its severance from the ground are imposed on a volumetric basis, each Mcf sold having a particular tax amount attributable to it, none of the weaknesses which are charged to public utility type regulation of producers in general would apply to the particular expense of taxes. Indeed recoupment of such volumetric tax costs is one of the few principles of producer rate regulation already established by Commission practice. Although an increase in contractual tax reimbursement, based upon enactment of a higher tax rate by the state legislature, may not be charged until the producer complies with rate change requirements of Section 4 of the Act, the Commission has consistently permitted such changes in rate to go into effect upon filing, without suspension or investigation as to reasonableness." Brief for Respondent Federal Power Commission, CA9, No. 16,692 (1960) at 22-23.

¹⁹ The gathering tax dockets are examples of Commission action where the first element, a valid tax, is in doubt. The severance tax dockets are examples of action where the contractual right to the reimbursement claimed is in doubt.

taxes paid by producers situate in Louisiana, the Commission, in the exercise of its discretion, should require those producers to bear a substantial proportion of such taxes out of their equity interest, in order to discourage the indirect imposition of these taxes upon the unrepresented (in Louisiana) interstate gas consumer.

Second, they argued (R. 3300) that the several producers may have no valid federally-cognizable contractual right to receive reimbursement for all or any part of the gathering or severance taxes imposed. For example, the contract provisions providing for reimbursement might be invalid under state or federal law.

Third, they pointed out (R. 3311) that since the pre-existing rate levels are untested, never having been approved by the Commission as to their justness and reasonableness in a full-scale rate proceeding under Section 4 or 5(a) of the Act,²⁰ it is entirely possible that the interstate consumer is being overcharged, even at the pre-existing rates, by amounts in excess of the amounts of the tax-inspired increases involved in the subject filings, and that the several producers could and in that event should be required to absorb such increase out of the current overcharges.

The Natural Gas Act—like its parent statute the Commerce Act—contemplates that upon the initiation of a proceeding under Section 4(e) the Commission will determine the lawfulness of the new *rate* involved in that proceeding, rather than only a *portion* of that rate. *Ayrshire Collieries*

²⁰ It will be recalled that, in 1954, the Supreme Court held that the Commission has certificate and rate jurisdiction over sales of gas by independent producers under the Natural Gas Act. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954). More than six years later, the Commission has yet to decide a major producer rate case under Sections 4 or 5(a). Except for the Examiner's Decision issued on April 6, 1959, in the remanded *Phillips* case, Docket No. G-11488, there have not been any Examiner's Decisions in major producer rate cases. While argued before the Commission on October 2, 1959, even the *Phillips* case is still undecided. Hearings are only starting in many, and most producer rate proceedings under Sections 4 and 5 of the Act are still in the investigative stages.

Corp. et al. v. United States, 335 U.S. 573 (1949).²¹ The burden is on the producer to prove both the economic justification of the *total rate* filed²² and his contractual right to file the rate,²³ and he must refund the resulting overcharges if he fails to prove either component of that burden. The Commission in each instance here ordered a hearing under Section 4(e) of Act "concerning the lawfulness of such rate" (*infra*, p. 20), which under that section put in issue the lawfulness of the entire new, filed rate. It follows that the question of the lawfulness of the whole rate, and therefore the pipelines' and distributors' customers right to refund on this ground, was directly placed in issue by the Commission's order. Under Section 4(e), the producer natural-gas company has the burden of establishing the lawfulness of the "increased rate or charge", which is to say the entire, newly filed rate, not merely some increment of it. The Commission in passing on a rate increase under Section 4(e) applies the standard imposed by Section 5(a) (*infra*, p. 22), which requires that the Commission "shall determine the just and reasonable rates", not merely hold that some part of the increased rate is valid or invalid. See *United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 340-341.

However, if the Commission were to find that the increased rates were unlawful on *any* of the three grounds advanced by petitioners, *supra*, petitioners could receive substantial refunds of amounts paid under the new rate filings, as well as lower rates for the future.

There can be no doubt, therefore, that petitioners were directly interested in the rate investigation and hearing

²¹ This was a decision under Section 15 (7) of the Interstate Commerce Act, 44 Stat. 1446, 49 U.S.C. § 15 (7), which provides that "after full hearing, whether completed before or after the rate . . . goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective." This language is substantially identical to the corresponding language in Section 4(e) of the Natural Gas Act. Accordingly, it should be given a corresponding reading. *Hope Natural Gas Co. v. FPC*, 196 F.2d 803, 806-07 (4th Cir. 1952).

²² Natural Gas Act § 4, 52 Stat. 822 (1938), 15 U.S.C. § 717c (1958).

²³ *United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

ordered by the Commission, since their petitions to intervene showed that they would be directly affected economically by the outcome of the proceedings.

Despite petitioners' clear interest and the fact that the Commission is required to pass upon the lawfulness of these increased rates, the Commission, for reasons which it apparently regarded as unnecessary to state, chose to carry on these rate investigations without the participation of any representatives of interested consumers. As we shall show in Point II, *infra*, the Natural Gas Act does not contemplate such "in camera" proceedings.

II

SINCE PETITIONERS ARE PARTIES HAVING A DIRECT ECONOMIC INTEREST IN THESE PROCEEDINGS, THE COMMISSION ACTED WITHOUT WARRANT IN LAW WHEN IT DENIED THEM INTERVENTION.

1. Section 15(a) of the Natural Gas Act provides in part that:

"In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any . . . representative of interested consumers . . . or any other person whose participation in the proceeding may be in the public interest." 52 Stat. 829 (1938), 15 U.S.C. § 717n (1958).

In construing this section and the rules under it,²⁴ due

²⁴ Rule 1.8(b) of the F.P.C. Rules of Practice and Procedure, 18 C.F.R. § 1.8, provides in part:

"1.8 intervention—

(b) *Who may petition.* A petition to intervene may be filed by any person claiming a right to intervene or an interest of such nature that intervention is necessary or appropriate to the administration of the statute under which the proceeding is brought. Such right or interest may be:

- (1) A right conferred by statute of the United States;
- (2) An interest which may be directly affected and which is not adequately represented by existing parties and as to which petitioners may be bound by the Commission's action in the proceeding . . .
- (3) Any other interest of such nature that petitioner's participation may be in the public interest."

regard must be had for the fact that "the Act was so framed as to afford *consumers* a complete, permanent and *effective* bond of protection from excessive rates and charges." *Atlantic Refining Co. v. Public Service Commission of N.Y.*, 360 U.S. 378, 388 (1959) (emphasis supplied). During this past term the Supreme Court reaffirmed this holding, stating that "the primary aim of the Natural Gas Act was 'to protect consumers against exploitation at the hands of natural gas companies' ". *Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, (1960). This holding derives from the Act as a whole, including an express legislative statement that it is "the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption . . . at the *lowest* possible reasonable rate consistent with the maintenance of adequate service in the public interest," 52 Stat. 825 (1938) (emphasis supplied). See 360 U.S. 388. Unless it is shown that participation of a consumer representative in Commission rate hearings could not possibly affect the rates paid by the consumers in question, the policy of the Natural Gas Act would appear to sanction or even require consumer intervention, and the Commission would abuse its discretion in denying participation.

We have seen that by denying intervention to all representatives of consumers, including Petitioners, the Commission would foreclose them from raising substantive questions concerning the future level of these rates and the treatment to be accorded contractual tax reimbursements.²⁵ The Commission's position presumably is that even though none of the pre-existing rates have been determined to be just and reasonable, and even though there are substantial questions of policy and laws inherent in the

²⁵ As this Court has recently held, Petitioners must be admitted as intervenors in order to have standing to seek review of the Commission's final action, *Public Service Commission v. FPC*, — U.S. App. D.C. —, CADC No. 15365 (April 28, 1960). Thus, if relief is not granted in these review proceedings, it will never be available to Petitioners.

"passing on" of state production taxes to the interstate consumer, these rate investigations can be carried on and completed without consideration of these issues.

The Commission cannot, however, by fiat prevent petitioners from being "aggrieved" by any order finally issued in these proceedings. Petitioners, as we shall show, as consumer representatives will unquestionably be aggrieved by an order approving rates at unjust and unlawful levels.²⁶ This Court held in *National Coal Association et al. v. F.P.C.*, 89 U.S. App. D.C. 135, 191 F.2d 462, 467 (1951), that any person who might be aggrieved by a Commission order has a *right* to participate in the hearings which will formulate that order. In that case, the Commission, noting that only *parties* may seek review under Section 19(b),²⁷ argued that it may shield itself from judicial scrutiny by exercising a purported discretion to deny intervention, thereby depriving the would-be-intervenors of the status necessary to challenge substantive action by the Commission. In disposing of such argument this Court held:

... [T]here are some persons who have a right to participate in Commission proceedings and some who do not. We think it is clear that *any person who would be "aggrieved" by the Commission's order ... is also a person who has right to intervene.* Otherwise, judicial review, which may be had only by a party to the proceedings before the Commission who has been "aggrieved" by its order could be denied or unduly forestalled by the Commission merely by denying intervention." *National Coal Ass'n et al. v. F.P.C.*, 191 F.2d 462, 467, 89 U.S. App. D.C. 135, (1951) (emphasis supplied).

²⁶ Since the Commission, as already stated, apparently does not intend to investigate the reasonableness of the increased rates, it is quite possible that the rates ultimately approved by the Commission will be unlawful.

²⁷ "Any party to a proceeding under this act *aggrieved* by an order issued by the Commission in such proceeding may obtain a review of such order in ... the United States Court of Appeals ..." 52 Stat. 837 (1938), as amended 15 U.S.C. § 717r(b) (1958) (emphasis supplied).

Thus, since Petitioners might be "aggrieved" by Commission action in the thirteen gathering and severance tax dockets, they have, even in Commission terms, a "right conferred by a statute of the United States"²⁸ to intervene and participate in the proceedings in such dockets, regardless of the artificial limitations the Commission may seek to place on the issues raised by its hearing order under Section 4(e).

2. It is also clear that Petitioners have standing to intervene, in view of their direct interest as consumer representatives. As a result of repeated unsuccessful effort of the Commission to stave off court review, an extensive jurisprudence has grown up around the word "aggrieved." It is clear that competitors can be "aggrieved" by certificate orders. *Virginia Petroleum Jobbers Ass'n v. FPC*, 104 U.S. App. D.C. 106, 265 F.2d 364 (1959); *National Coal Ass'n v. FPC*, 89 U.S. App. D.C. 135, 191 F. 2d 462 (1951); so also those who represent such remote interests as conservation. *Cia Mexicana de Gas, SA v. FPC*, 167 F. 2d 804 (5th Cir. 1948). See similar holdings under comparable review provisions of other federal regulatory acts, e.g., *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

The Commission has seldom, however, challenged the right of the consumer, the one who digs down in his pocket to pay the bills, or his representative to participate in a rate proceeding involving increases which he will be called upon to pay. Since "one threatened with financial loss through increased competition resulting from a Commission's order is aggrieved, . . . It would seem clear . . . that a consumer threatened with financial loss by a Commission's order, which fixes prices . . . is also a 'person aggrieved'." *Associated Industries of N.Y. State, Inc. v. Ickes et al.*, 134 F. 2d 694, 705 (2d Cir. 1943), vacated as moot, 320 U.S. 707 (1943). This is particularly true where no official is assail-

²⁸ See Rules of Practice and Procedure 1.8, note 24, *supra*.

ing the orders under review on the consumers' behalf. *Id.* at 706-707.

Furthermore, since Petitioners are and for some time have been *paying* the increased rates involved in the subject dockets (as pointed out in Point I, *supra*) they face aggrievement at the hands of the Commission which does not await any future filings, compare *Dayton Power & Light Co. v. FPC*, 101 U.S. App. D.C. 7, 246 F.2d 694 (1957), and which certainly cannot be characterized as "remote". Compare *Cincinnati Gas & Elec. Co. et al. v. FPC*, 101 U.S. App. D.C. 1, 246 F.2d 688 (1957).

Furthermore, the status of Petitioners as "aggrieved" parties in Commission proceedings directly relating to the rate at which producers sell to Petitioners' pipeline suppliers appears to be settled. In *Public Service Commission of State of New York v. FPC*, 257 F. 2d 717 (3rd Cir. 1958), *aff'd sub nom. Atlantic Refining Co. v. Public Service Comm'n*, 360 U.S. 378 (1959), distributing companies such as Petitioners sought to challenge Commission approval of a new, high initial rate for sales by a group of producers (sometimes referred to as "CATCO") to the interstate pipeline company supplying these distributors. There the Commission argued that the distributing companies were not "aggrieved" by its action in the producer-pipeline dockets, but the Third Circuit held:

"... CATCO, and the Commission argue that the petitioners have no standing to ask this court to review the order ... because they are not 'aggrieved' as required by Section 19(b) of the Act. Essentially, the petitioners represent the ultimate consumers of the gas. In *Natural Gas Pipeline Company of America v. Federal Power Commission*, 3 Cir., 1958, 253 F.2d 3, certiorari denied *Dorchester Corp. v. Natural Gas Pipeline Co. of America*, 78 S. Ct. 1372, we held that a gas transmission company which has passed its increases on to its customers is 'aggrieved', since as a matter of ethics and good business, it is required to protect its

customers. Here the petitioners are more nearly representative of the ultimate consumers than was Natural Gas Pipeline Company in that case . . . [I]t is clear the argument that petitioners are not 'aggrieved' is without substance." *Id.* at 720-21.

Since "aggrievement" is jurisdictional, the Supreme Court, at least by implication, has affirmed this holding in its CATCO decision. See also *Memphis Light, Gas & Water Division et al. v. FPC*, 102 U.S. App. D.C. 77, 250 F.2d 402 (1957), rev'd on other grounds, 358 U.S. 103 (1958).

For all of these reasons, it is clear that Petitioners, as rate payers who are now paying the increases in question, have the requisite standing to challenge adverse Commission action in these proceedings.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that they have a present, legally-enforceable right to participate in the instant proceedings and that the Commission erred in denying their intervention petitions. Accordingly, they respectfully urge that the Commissions' orders be vacated and set aside and the matters remanded to the Federal Power Commission with directions to admit the petitioners to the thirteen dockets in which they sought intervention.

Respectfully submitted,

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ADDENDUM 1
Natural Gas Act

The pertinent provisions of the Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821; as amended, 15 U.S.C. §§ 717-717w, are as follows:

Section 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

* * * * *

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter

upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate-charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such

questions preference over other questions pending before it and decide the same as speedily as possible.

* * * * *

[52 Stat. 822 (1938); 15 U.S.C. § 717c]

Section 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * *

[52 Stat. 824 (1938); 15 U.S.C. § 717e]

* * * * *

Section 15. (a) Hearings under this act may be held before the Commission, any member or members thereof, or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit

as a party any interested State, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

[52 Stat. 829 (1938); 15 U.S.C. § 717n]

* * * * *

Section 19. (a) . . .

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States, for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings be-

fore the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

* * * * *

[52 Stat. 831 (1938), as amended, Aug. 28, 1958, Pub. L. 85-791, § 19, 72 Stat. 947, 15 U.S.C. § 717r]

**Federal Power Commission
Rules of Practice and Procedure**

§ 1.8 *Intervention*—(a) *Initiation of intervention*. Participation in a proceeding as an intervener may be initiated as follows:

(1) By the filing of a notice of intervention by a State Commission, including any regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy, or natural gas, as the case may be, to consumers within the intervening State or municipality.

(2) By order of the Commission upon petition to intervene.

(b) *Who may petition*. A petition to intervene may be filed by any person claiming a right to intervene or an interest of such nature that intervention is necessary or

appropriate to the administration of the statute under which the proceeding is brought. Such right or interest may be:

- (1) A right conferred by statute of the United States;
- (2) An interest which may be directly affected and which is not adequately represented by existing parties and as to which petitioners may be bound by the Commission's action in the proceeding (the following may have such an interest: consumers served by the applicant, defendant, or respondent; holders of securities of the applicant, defendant, or respondent; and competitors of the applicant, defendant, or respondent).

* * * * *

[18 C.F.R. § 1.8.]

Louisiana State Statutes

The pertinent provisions of the Louisiana Revised Statutes are as follows:

§ 631. Imposition of tax

Taxes as authorized by Section 21 of Article X of the Constitution of Louisiana, are hereby levied upon all natural resources severed from the soil or water, including all forms of timber, including pulp woods, and turpentine and other forest products; minerals such as oil, gas, natural gasoline, distillate, condensate, casinghead gasoline, sulphur, salt, coal, lignite and ores; also marble, stone, gravel, sand, shells and other natural deposits; and the salt content in brine.

[47 La. Rev. Stat. 1950, § 631.]

* * * * *

§ 633. Rates of tax

The taxes on natural resources severed from the soil or water, levied by R.S. 47:631 shall be predicated on the quantity severed and shall be paid at the following rates:

* * * * *

(9) On gas three-tenths of one cent per thousand cubic feet

The tax shall not accrue, (a) on the severance of gas which is subsequently restored to the formation of the earth in Louisiana, and (b) on the severance of gas, when produced from oil wells and vented or flared directly into the atmosphere; provided that it is the intent of this Act that gas injected into an oil well to be used in lifting oil by the method commonly known as "gas lift" shall not be excluded or exempt from the severance tax, and such gas shall not be deemed to be produced from the gas lift well.

* * * * *

[47 La. Rev. Stat. 1950, § 633, as amended Acts 1950, No. 449, § 1]

§ 633. Rates of tax

The taxes on natural resources severed from the soil or water, levied by R.S. 47:631 shall be predicated on the quantity severed and shall be paid at the following rates:

* * * * *

(9) On gas, two and three-tenths cents per thousand cubic feet

On and after August 1, 1960, the tax rates provided in this Paragraph 9 shall revert to three-tenths cent per thousand cubic feet. In the event the gas gathering taxes imposed by R.S. 47:671 through 47:681 are ultimately held to be constitutional as not violative of the commerce clause of the United States Constitution, by the final decision of a court of last resort having jurisdiction, prior to August

1, 1960, then the rates hereunder shall revert to three-tenths cent per thousand cubic feet effective as of the time the gas gathering taxes again become effective as provided for in R.S. 47:681.¹

The tax shall not accrue: (a) on the severance of gas which is subsequently restored to the formation of the earth in Louisiana; (b) on the severance of gas, when produced from oil wells and vented or flared directly into the atmosphere, provided that it is the intent of this Chapter that gas injected into an oil well to be used in lifting oil by the method commonly known as "gas lift" shall not be excluded or exempt from the severance tax, and such gas shall not be deemed to be produced from the gas lift well; (c) on the severance of gas used for fuel in connection with the operation and development for, or production of, oil or gas in the field where produced; and (d) on the severance of gas used in the manufacture of carbon black.

* * * * *

[47 La. Rev. Stat. 1950, § 633, as amended Acts 1958, Ex. Sess., No. 2, § 2]

§ 635. Reports and payment of taxes by severers

* * * * *

The first tax due under this Part shall be that levied for the month beginning 7:00 A.M., December 1, 1958. The collector is authorized to provide for such tax to be reported and paid along with that levied for the first two months of the quarter ending December 31, 1958, under the previously existing statute, except that both such periods shall be due and payable on or before January 20, 1959.

[47 La. Rev. Stat. 1950, § 635, as amended Acts 1958, Ex. Sess., No. 2, § 3]

* * * * *

¹ The tax has been extended until 7:00 A.M. on June 30, 1964 by Acts 1960, Regular sess., No. 9.

§ 671. Imposition of tax

In addition to all other licenses and taxes levied and assessed in the State of Louisiana, there is hereby levied upon every person engaged in gathering gas produced in this state, an excise, license or privilege tax, for the privilege of engaging in such business, at the rate of one cent (1¢) per thousand (1,000) cubic feet (corrected to a base pressure of 15,025 pounds per square inch, absolute pressure) of gas gathered.

[47 La. Rev. Stat. 1950, § 671]

* * * * *

§ 678. Imposition of additional tax; duration

In addition to all other licenses and taxes levied and assessed in the State of Louisiana, and in addition to all other taxes levied thereon, there is hereby levied upon every person engaged in gathering gas produced in this state an excise, license or privilege tax for the privilege of engaging in said business, at the rate of one cent per thousand cubic feet (corrected to a base pressure of 15.025 pounds per square inch, absolute pressure) of gas gathered, which tax shall be levied and collected for a period of two years beginning August 1, 1958 and continuing through and including July 31, 1960.

[47 La. Rev. Stat. 1950, § 678, added Acts 1958, No. 8, § 1]

* * * * *

§ 681.1 Suspension of taxes levied by R.S. 47:671-47:681

A. The levy of taxes under Sections 671 through 681, inclusive, of Title 47 of the Louisiana Revised Statutes of 1950 is hereby suspended, effective 7:00 A. M. December 1, 1958, and shall remain suspended until the question of whether such taxes are valid and constitutional and are not violative of the commerce clause of the United States

Constitution has been judicially determined by the final decision of a court of last resort having jurisdiction, so that during the period of suspension there shall be no such taxes levied. In the event the taxes are so judicially determined to be valid and constitutional, this suspension shall terminate commencing 7:00 A. M. the first day of the month following the finality of such judicial determination. Nothing herein contained shall serve to extend the time or term of the levy of any of such taxes or any part thereof if same is limited in the statute enacting or levying same.

B. In the event such taxes are declared invalid or unconstitutional as to gas entering interstate commerce, such taxes shall not be levied as to gas entering intrastate commerce.

[47 La. Rev. Stat. 1950, § 681.1, added Acts 1958, Ex. Sess., No. 3, § 1]

* * * * *

9

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 15637, 15746

WILLISTON C. KNORL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

OLIVER GASCH,

United States Attorney.

CARL W. BELCHER,

HARRY T. ALEXANDER,

Assistant United States Attorneys.

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED JUN 24 1960

Joseph D. Stewart

CLERK

Nos. 15637, 15746

QUESTION PRESENTED

Does the record disclose appellant was denied the effective assistance of trial counsel where appellant—while competent to stand trial testified in his own behalf seeking outright acquittal—does not contend he was coerced into deleting “some evidence” of alleged criminal insanity, failed to testify at his hearing pursuant to 28 U.S.C. § 2255, and testimony of trial counsel remains uncontradicted that a premature or protective motion for mental examination was withdrawn with appellant’s consent, in his presence, and that counsel would have pursued the issue had appellant not agreed to withdrawal of the premature motion for mental examination, for which counsel testified he could find no supporting information, despite conscientious investigation?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 15637, 15746

WILLISTON C. KNORL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On November 12, 1958, an indictment filed in the District Court charged appellant, Williston C. Knorl, with an October 19, 1958 robbery committed in violation of 22 D.C.C. § 2901 (J.A. 4). On December 4, 1958, counsel appointed to represent appellant filed a motion for mental examination, to which he attached his personal affidavit (J.A. 5-6). Subsequently, on December 12, 1958, counsel appeared before the court and in the presence of appellant, withdrew his motion for mental examination (J.A. 6). In pertinent part, counsel advised the court that since filing of the motion (J.A. 7):

I contacted two relatives of the defendant and find both of them stating they didn't have sufficient knowledge of the defendant to make any statement * * * or anything bearing on his [appellant's] insanity, so upon these—I can find no record at this time of any evidence which would so indicate that there was any question of

sanity in the matter and therefore I would like to withdraw the motion at this time.

I think I would like to add that if there is any evidence of insanity in this case, I will bring it to the Court's attention.

Therefore, appellant was granted leave to withdraw his motion. Counsel also stated that the United States Marshal who prior to filing of the motion informed counsel that relatives of appellant were desirous of his having a mental examination, had left the jurisdiction (J.A. 7). Appellant, although present at the time of counsel's representations, failed to utter a position contrary to that of his appointed counsel.

Appellant's trial by jury was had on January 8, 1959. The criminal blotter reflects that appellant testified as a witness in his own behalf. Appellant does not contend that he introduced "some evidence" of insanity during his testimony or that his counsel or anyone else prohibited him from doing so (J.A. 7-8). A *nunc pro tunc* determination of appellant's mental condition at the time of his trial reveals appellant was competent to stand trial (J.A. 21, 25). Upon completion of his trial, the jury rejected appellant's defense and convicted him of robbery as indicted (J.A. 8).

Appellant remained in custody at the District of Columbia Jail from the date of his January 8th conviction pending report from the Probation Office, to and including February 6, 1959, the date of sentence (J.A. 8-9). During the latter interval of approximately one month, appellant made no complaint against his appointed trial counsel. When specifically asked at the time of sentence whether appellant had anything to say "why sentence should not be pronounced," appellant replied "I guess not," and "I don't guess so" (J.A. 9). On February 11, 1959, appellant asserted as grounds for appeal the bare conclusion of "ineffective assistance of counsel" (J.A. 2; also see Record).¹

¹ Not until filing his petition in this Court did appellant allege trial counsel's failure to raise the defense of insanity constituted ineffective assistance of counsel. See Misc. No. 1249.

A. 28 U.S.C. § 2255 Hearing

During a hearing held January 15, 1960, pursuant to 28 U.S.C. § 2255, appellant's trial counsel, called by the Government, testified appellant "seemed perfectly normal" during his initial forty-five minute interview (Tr. 11). Moreover, counsel had seen appellant about ten times prior to trial and conferred with him on each occasion; in addition to conferences held between continuances of the trial date. At no time did appellant indicate "there was anything mentally wrong with him." Appellant neither remarked about having heard dogs talking to him nor of having heard voices (J.A. 17).

Counsel had filed the motion for mental examination upon his "own initiative, feeling * * * if there was something wrong, that I should take the matter up" (J.A. 17). A marshal had approached counsel upon his first conference with appellant in the cell block, informed counsel "there might be something wrong with appellant" because appellant previously had "had a fight and had beaten up his mother." Because time was running, counsel filed the motion before he could verify "something was wrong" with appellant. Appellant had given no such indication (J.A. 15-16).

After filing the motion, counsel (J.A. 16)

* * * immediately went to work and contacted relatives of Mr. Knorl, and I spoke to a cousin, an uncle, and tried on four occasions to contact his mother and sister. And in talking to these people I found that there was nothing, there wasn't any basis for a mental examination.

Counsel conducted further investigation as he testified (J.A. 16):

I also had a student attorney working with me and he went over to D.C. General Hospital, checked the records at D.C. General. The only thing we found was one instance where Mr. Knorl had been committed—not committed—but had been over to D.C. General for examination where he apparently had attempted suicide.

However, he was discharged by the doctors there and they said there was nothing wrong with him.

As a result counsel exercised the following judgment, and received appellant's approval to withdraw the motion as shown by the following testimony (J.A. 17):

I understood those two doctors to be psychiatrists. Feeling that there was no basis upon which to continue with the examination, I went back and talked to Mr. Knorl and we agreed to withdraw the motion, and this motion was withdrawn in open court before Judge Sirica in Mr. Knorl's presence.

In fact, the idea of a mental examination was never appellants. In any event, if appellant had not agreed to withdrawal of the motion before court appearance, counsel "would have gone ahead with the mental examination" (J.A. 17).

Counsel further testified he did not consider presenting the defense of insanity because (J.A. 17-18):

When I first spoke to Mr. Knorl and the subsequent times, it was my understanding, as he explained it to me, that he had been drinking prior to the commission of the crime for several days and was taking some medicine that was given to him by the doctors at D.C. General, and the combination of the two rendered him so intoxicated that I felt the defense should be that he was unable to perform the specific intent that was required for the commission of the crime.

But my defense was based * * * one-hundred per cent on—he was intoxicated and therefore unable to form the intent necessary.

On cross examination trial counsel revealed, in response to specific interrogation, that he had had experience with persons who are mentally incompetent by virtue of his "work on Mental Health Commission at St. Elizabeths" Hospital. When asked further whether he was competent to judge mental competency, trial counsel answered his was the "duty * * * [to] determine whether there was any basis upon which we were to proceed with the defense of insanity" but decided to withdraw the motion only after finding "no records" of insanity, nor any-

one "who would state that there was any reason for proceeding in the mental health examination itself" (J.A. 18).

When asked concerning his failure to raise the defense of insanity, counsel testified he had checked this matter out *as best* he could. Directed to the significance of information that appellant had beaten his mother on a prior occasion, trial counsel testified (J.A. 18),

that was the first thing that caught my attention.

Now I talked and checked with relatives, one being a cousin and the other an uncle, who informed me that the reasoning behind that was apparently Mr. Knorl's mother and father were separated, and she constantly took up fighting against the husband or calling him things, and making a big to do about it and he would take up for his father who was apparently very good to him * * * With that in mind, I would understand—I didn't feel that there was any insanity involved.

* * *

I felt it was a family squabble and apparently, * * * she was just mad enough to take it up with the authorities.

Since appellant was "prone" to get involved in assault cases and relatives had explained the "family squabble," counsel felt "there wasn't any insanity involved" (J.A. 19). With respect to the significance of appellant having feigned a suicidal attempt in 1955, trial counsel testified he accepted the word of the two examining psychiatrists who concluded there was nothing wrong with appellant. Counsel concluded upon the basis of his investigation there was no "basis whatsoever to raise the issue of insanity" (J.A. 19).

Called as a witness by the Government, *Dr. Joseph S. Costa* of D.C. General Hospital testified he had determined that appellant was competent to stand trial at the time of trial (J.A. 21, 25). Dr. Costa corroborated trial counsel's information with respect to appellant having feigned or malingered a suicidal attempt on February 18, 1955 (J.A. 23). The doctor disclosed that persons without mental disorder feign suicide

or perform suicidal gestures in order "to somehow manipulate the environment" (Tr. 28).

Following the aforementioned testimony offered by the Government, appellant failed to offer himself or call any witnesses in his behalf (J.A. 25). The District Court entered an order denying appellant's motion to vacate the sentence, and entered the following pertinent findings of fact and conclusions of law (J.A. 26-27):

* * * after having considered the motion and the files and records in this case, and the testimony and argument adduced in open court, the Court makes the following findings of fact:

1. A hearing was held on the motion to vacate on January 15, 1960 at which time the defendant was present and was represented by counsel.

2. The defendant has failed to produce any substantial evidence to sustain his charges that counsel was ineffective in (a) withdrawing his motion for a mental examination to determine the defendant's competency to stand trial, or (b) failing to present and argue the question of insanity at the time of the offense.

3. Not only has the defendant failed to sustain his burden of proof in regard to his allegations of ineffective assistance of counsel, but the Court finds from the records and the evidence that counsel competently, conscientiously and diligently represented the defendant in this case.

4. At the time of trial, the defendant was able to understand the nature of the proceedings pending against him and properly to assist in his own defense.

Whereupon, the court concludes as a matter of law that the defendant is entitled to no relief and that his motion should be denied.

Accordingly, the District Court entered an appropriate order.

STATUTE INVOLVED

Title 28 U.S.C. § 2255 provides, in pertinent part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

SUMMARY OF ARGUMENT

Appellant's trial counsel is not guilty of ineffective assistance of counsel. To the contrary, counsel was conscientious, diligent and competent.

The record reflects counsel for appellant had numerous conferences with appellant prior to trial; thoroughly investigated in order to determine whether sufficient grounds existed to proceed with a protective or premature motion for mental examination and did not withdraw the motion without appellant's consent after findings from this investigation proved fruitless. The record also reflects appellant did not object when the motion was withdrawn, that he was competent to stand trial, that he did not complain about counsel immediately at the time of sentence, the first personal opportunity following sentence. No contention is made, nor does the record reflect appellant was coerced into deleting "some evidence" of alleged insanity. Although the opportunity existed appellant did not testify at his hearing pursuant to 28 U.S.C. § 2255. Thus, testimony of trial counsel that the motion for mental examination was withdrawn with appellant's consent, that neither appellant nor his relatives supplied information tending to show insanity, that counsel would have pursued the issue further if appellant had not consented to withdraw the motion and that strategy of the defense was for outright acquittal based upon intoxication remains uncontradicted.

From the foregoing it is clear appellant failed to sustain his burden to prove upon the hearing of his § 2255 motion that his trial counsel denied him effective assistance of counsel by failing to interpose the defense of insanity. The facts of record and well established law militate against such a contention. Both counsel and appellant exercised the judgment left to them after careful consideration occasioned by some ten conferences. Appellant has not sustained his difficult burden on appeal.

ARGUMENT

Failure to raise the defense of insanity did not constitute denial of effective assistance of counsel

Appellant contends trial counsel denied him effective assistance of counsel by failing to raise the defense of insanity.

Both the record before the Court and well established law militate against this contention.

The record reflects trial counsel was both diligent and thorough in his pretrial investigation of appellant's mental condition. Counsel not only filed a *protective* or premature motion for mental examination, but carefully sought information to constitute *prima facie* evidence required to obtain a mental examination under 24 D.C.C. § 301(a). Relatives contacted could not supply any such information. In fact, the relatives assisted trial counsel in concluding an isolated incident when appellant beat his mother which occurred during a "family squabble" or domestic discord. Appellant's conduct constituted defense of his father or an objection to the physical and verbal abuse directed by appellant's mother against his father, "who was apparently very good" to appellant. Counsel also conducted additional investigation and satisfied himself from the records at D.C. General Hospital that appellant had feigned or malingered a suicide attempt in 1955. Although present at his § 2255 hearing appellant did not personally seek to refute counsel's findings and conclusions. Nor did he call mother or relatives to do so for him.

Appellant's failure to call witnesses or testify in his behalf is especially significant since trial counsel also revealed that the motion to withdraw the motion for mental examination was filed after conference with appellant, *with his agreement* and was argued in appellant's presence. In support of the withdrawal, counsel had on that occasion presented to the District Court substantially the same reasons later given during the § 2255 hearings.

Appellant's muteness at his hearing, prescinding from his burden of proof, is further significant since counsel also revealed that appellant had neither spoken of hearing voices—animal or human—nor had appellant indicated anything was mentally wrong with him during approximately ten conferences held before trial. Only after investigation failed to disclose sufficient basis for the motion for mental examination and appellant's agreement did counsel seek to withdraw the *protective* motion he had filed out of an abundance of caution. Appellant cannot complain of his actions now. See *Hensley v.*

United States, — U.S. App. D.C. —, — F. 2d — (No. 15,434, decided June 10, 1960). Counsel would have pursued the issue if appellant had desired. But see *Lebron v. United States*, 97 U.S. App. D.C. 33, 229 F. 2d 16 (1955); *Wright v. United States*, 94 U.S. App. D.C. 307, 215 F. 2d 498 (1959).

Contrary to appellant's position on appeal (Br. 3), to have malingered mental illness on one occasion is no grounds to suspect the malingerer of mental illness approximately four years later when the instant crime was committed.² Indeed, such a chronology would rather suggest distrust in the malingerer's credibility, or even that such a person would mangle again. Nor do circumstances of record surrounding the "family squabble"—not disputed by appellant or elaborated upon with respect to time or circumstance—constitute evidence of a mental disease or defect then, or at some later date. Cf. *Walter U. Smith v. United States*, 106 U.S. App. D.C. 318, 272 F. 2d 549 (1959).

Moreover, the record reflects, by virtue of a *nunc pro tunc* determination, appellant was competent to stand trial. While competent, appellant testified *at trial* in his own behalf. He does not contend that he introduced "some evidence" of insanity at his trial; i.e., relating that he had either attacked his mother or had been guilty of a "simulated suicide attempt" (Br. 3), or by relating any bizarre incidents. Nor does he contend coercion prevented him from doing so. Cf. *McHale v. United States*, 106 U.S. App. D.C. 24, 268 F. 2d 899 (1959); *Holley v. United States*, 105 U.S. App. D.C. 351, 267 F. 2d 628 (1959). Nor did appellant so contend at his hearing. About these matters and others, appellant was free to include such in his testimony at trial. See *Goforth v. United States*, 106 U.S. App. D.C. 111, 269 F. 2d 788 (1959); *Clark v. United States*, 104 U.S. App. D.C. 27, 259 F. 2d 184 (1958). In failing to do so, appellant exercised his free, voluntary, competent and *personal* choice.

Appellant's burden of proof upon his § 2255 motion at least required an explanation why he did not relate such incidents

² The record reflects appellant's 1953 mental observation was occasioned by his false report that he had taken four cyanide pills—an instantaneously lethal dose (J.A. 23).

during his testimony at trial. Especially is this true upon so serious a charge as ineffective assistance of counsel, and when it is alleged *trial counsel*—rather than appellant personally, who had the opportunity to do so—failed to raise the defense of insanity. Such explanations as should have been forthcoming from appellant go to the very crux of why “some evidence” of insanity was not given the jury by appellant himself. Thus, it is patent, appellant failed to sustain his burden as the District Court held (J.A. 27).

When fairly read, this record admits of a conclusion that trial counsel and the appellant agreed for the aforementioned reasons the motion for mental examination should be withdrawn; that a defense for outright acquittal upon the grounds of incapacity to form specific intent due to intoxication was decided upon; that both trial counsel and appellant concurred in the use thereof (since he does not contend otherwise), and that appellant gambled and lost, when he was competent to stand trial. Thus, since appellant was competent to stand trial *Wells v. United States*, 99 U.S. App. D.C. 310, 239 F. 2d 931 (1956) is dispositive of the instant appeal.

It is significant in *Wells*, that a mental examination *after verdict*, and *before sentence* disclosed the defendant suffered from a serious psychosis, after which Wells was judicially determined of unsound mind, committed to a hospital for three years before being judicially restored to competency, but no determination of competency to stand trial had been made. This Court on appeal did not order a new trial to allow the defense of insanity to be interposed. In pertinent part, the Court held, 239 F. 2d at 932:

*If * * * it shall have been judicially determined that appellant was competent when tried * * * the conviction is to stand.*

It is not disputed in the instant case appellant was competent when tried.

Contrary to appellant's position (Br. 3), he is *not* now suffering from a mental illness. From appellant's hearsay autobiographical account, not corroborated by appellant at the hearing, the psychiatrists revealed appellant *had* suffered

alcoholic hallucinosis, an acute condition of relatively short duration, "a not unusual condition of people that drink" (J.A. 24). Moreover, contrary to appellant's apparent contention (Br. 2), the particular diagnosis was not predicated upon "impulsive behavior in assaults, fights, etc." but solely upon the proximate effects of appellant's drinking (J.A. 21).³ In any event, it is clear, appellant's prior condition was not a severe psychosis of long duration such as in *Wells, supra*. *Ergo*, it follows "the conviction is to stand." *Id.*⁴ This is as it should be. A plea of guilty entered by a defendant who is competent to stand trial constitutes a waiver of all defenses, *Edwards v. United States, infra*, including insanity. *Bishop v. United States*, 96 U.S. App. D.C. 117, 223 F. 2d 582 (1955), rev'd on other grounds, 350 U.S. 961 (1956). No distinction should be drawn where guilt is established after appellant has testified at trial. In both instances the defendants are protected. See 22 D.C.C. § 302, 18 U.S.C. §§ 4241, 4245.

Above all, the record reflects, trial counsel was competent; he was diligent; he exercised judgment and strategy. Assuming, *arguendo*, mismanagement of the defense by trial counsel such

³ The doctor testified appellant "had told me about hearing voices and that this usually occurred when he was drinking and he stated this had happened about the time of the crime.

This is a condition known as alcoholic hallucinosis which usually clears up in a matter of days, and certainly does not last longer than several weeks" (J.A. 21).

⁴ No doubt, habeas corpus would be immediately invoked as appellant is without mental disease. Cf. *Ragsdale v. United States*, — U.S. App. D.C. —, — F. 2d —, (No. 15437, decided June 23, 1960). His testimony having failed to win him outright acquittal, appellant now seeks leave to assert another defense, no doubt in hopes a second trial will gain his desired outright acquittal or treatment at St. Elizabeths Hospital for a term shorter than his sentence of two to ten years imprisonment for the robbery he committed. To allow a second trial under these circumstances where the defendant was competent to stand trial is to encourage some defendants to seek outright acquittal at his first trial with assurance, if he is dissatisfied with the sentence imposed he can have a second attempt at outright acquittal or as a third choice treatment in a hospital, perhaps for a shorter duration than the previously imposed punishment. Sanction to what this record reflects may even suggest such procedure as future strategy to some counsel. Neither *Goforth*, *McHale*, *Clark* nor *Holley, infra*, are consistent with the rule appellant desires. *Wells* is apparently diametrically opposed to appellant's position.

is "generally not grounds for a new trial," appellant desires. *Burton v. United States*, 80 U.S. App. D.C. 208, 151 F. 2d 17, 18 (1945), cert. denied, 326 U.S. 789. Appellant is entitled to a fair trial, *Mitchell v. United States*, 104 U.S. App. D.C. 57, 259 F. 2d 787 (1958), not a perfect one, *Hensley v. United States*, *supra*. Any suggestion "that it is the duty of this Court to substitute its judgment of the proper tactics in the trial for that of the lawyer of the forum is baseless and unacceptable." *Felton v. United States*, 83 U.S. App. D.C. 277, 170 F. 2d 153 (1948), cert. denied, 355 U.S. 831. In accord therewith this Court observed in *Mitchell*, *supra*, "Bad judgment, or even good but erroneous judgment, may result in adverse effects. These are simply facts of trial; they are not justiciable issues." *Id.*, 259 F. 2d at 792. See also *Edwards v. United States*, 103 U.S. App. D.C. 152, 256 F. 2d 707 (1958), cert. denied, wherein the court declared neither "improvident strategy, bad tactics, mistake, carelessness, or inexperience," standing alone, constitute ineffective assistance of counsel. The trial must have been a "mockery of justice." In *Wells*, the trial was not; the instant trial cannot be.

Thus, from the foregoing, it is patent counsel did not deny appellant ineffective assistance of counsel. The exercise of strategy and judgment based upon conscientious investigation precludes such a determination. It is not amiss to reiterate appellant testified during his trial and could have introduced whatever evidence he had concerning his mental condition. He failed to do so, and failed to offer reasons why he did not.⁵ Appellant has not only failed in his burden to prove his allegations on the § 2255 hearing, but fails to sustain his *difficult burden* on appeal. *Edwards v. United States*, *supra*.

Suffice it to add in the findings of the trial court, trial "counsel competently, conscientiously and diligently represented the defendant in this case." No evidence of record appears to the contrary.

⁵ It is equally significant no complaint of ineffective assistance of counsel was made at the time of sentence when appellant was first present before the court, after verdict.

CONCLUSION

Wherefore, it is respectfully submitted the judgment of the District Court be affirmed.

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